

NACsNGUs

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

07 CR 1121 (PAE)

5 HOA DUC NGUYEN,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 October 12, 2023  
3:00 p.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13  
14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the  
Southern District of New York

17 BY: JACKIE DELLIGATTI

Assistant United States Attorney

18 ARLO DEVLIN-BROWN

19 PATRICK MATTINA

Attorneys for Defendant

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(Case called)

THE DEPUTY CLERK: Counsel, starting with the front table, please state your appearance for the record.

MS. DELLIGATTI: Good afternoon, your Honor.

Jackie Delligatti for the government.

THE COURT: All right. Good afternoon. Thank you.

MR. MATTINA: Patrick Mattina for Mr. Nguyen and I'm joined here today by Arlo Devlin-Brown.

THE COURT: Very good.

Good afternoon, Mr. Mattina.

Good afternoon, Mr. Devlin-Brown.

And, of course, good afternoon to you, Mr. Nguyen.

Mr. Mattina, am I correct that your client's last name is pronounced Nguyen?

MR. MATTINA: I'm told it's pronounced Nguyen.

THE COURT: I will try to be sensitive to that.

May I ask you, Mr. Mattina. This is, of course, the first proceeding I've had with Mr. Nguyen.

Does Mr. Nguyen speak English?

MR. MATTINA: Yes, your Honor.

THE COURT: Good afternoon, in any event, to you.

THE DEFENDANT: Good afternoon to you, your Honor.

THE COURT: Before we begin, first of all, I want to thank defense counsel for taking on this representation, and second of all, I need to make the following disclosure which is

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1 known to the defense, but will not be known to the government,  
2 which is to say that Mr. Devlin-Brown is a friend of mine.

3 He and I worked together for a number of years long  
4 ago at the WilmerHale law firm, and I was very pleased to be a  
5 reference for Mr. Devlin-Brown when he applied to be an AUSA,  
6 and I consider myself still a friend and a mentor to him. I  
7 assume that does not in any way concern the government in terms  
8 of the defense's service, or rather my service on the case, but  
9 I wanted to put it on the record.

10 MS. DELLIGATTI: No, your Honor. Thank you.

11 THE COURT: With that, we're here today to reimpose  
12 sentence in the case of United States v. Hoa Duc Nguyen. Some  
13 background is necessary at the outset.

14 After entering guilty pleas in 2007 and 2008 to  
15 numerous counts spanning five indictments, Mr. Nguyen, on  
16 February 21, 2012, was sentenced by the Honorable Deborah Batts  
17 to an overall sentence of 300 months' imprisonment.

18 Relevant here, as constructed by Judge Batts, the  
19 sentence imposed was of 240 months on each of seven counts,  
20 60 months on each of two counts, and 120 months on each of two  
21 counts. All of those to run concurrently with one another.

22 Additionally, as relevant here, Mr. Nguyen was  
23 sentenced to a 60-month term of imprisonment on each of two  
24 firearms counts on what the government calls, and which I will  
25 call today, indictment number three. And that 60-month term

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1 was to run concurrently across the two firearms counts, but  
2 consecutive to the 240-month sentence imposed collectively on  
3 all the other counts.

4 The 300-month or 25-year sentence that Judge Batts  
5 imposed reflected a very substantial downward departure  
6 reflecting the defendant's substantial assistance. Absent the;  
7 downward departure, Mr. Nguyen's was having an offense level of  
8 48 and a criminal history category IV, calling for a sentence  
9 of life imprisonment.

10 But for the government's motion under Section 5K1.1 of  
11 the guidelines and Section 3553(E) of Title 18, Mr. Nguyen  
12 would have faced a mandatory life sentence on one count, Count  
13 One of indictment one, and among other mandatory outcomes,  
14 mandatory consecutive sentence on the two firearms counts from  
15 indictment number three that I affected earlier.

16 Closer to the present, on December 16, 2022,  
17 Mr. Nguyen filed a motion for compassionate release. In a  
18 decision issued April 3, 2023, this court -- which had been  
19 reassigned the case following the untimely death of Judge  
20 Batts -- denied the motion, finding no basis to reduce the  
21 defendant's sentence.

22 However, in that same decision, the court did note  
23 that in light of intervening case law, specifically the case of  
24 *United States v. Taylor*, 142 S. Ct. 2015, the two firearms  
25 counts in indictment number three which had been brought under

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1 Title 18, United States Code, Section 924(c) were no longer  
2 legally valid.

3 The court invited Mr. Nguyen to move to vacate those  
4 counts and to pursue resentencing on the many surviving counts.  
5 The court noted that because the basis for invalidating the two  
6 firearm counts was a strictly technical one that had nothing  
7 whatsoever to do with Mr. Nguyen, there was no assurance on  
8 resentencing the court would not impose the same aggregate  
9 sentence as before, just distributed differently among the  
10 surviving counts.

11 The purpose of this proceeding in the first instance  
12 is for the court to receive a motion to dismiss Counts Three  
13 and Four of indictment number three in light of *Taylor*, and  
14 then to proceed to resentencing.

15 So with that, government counsel, is there a motion to  
16 dismiss those two firearms counts?

17 MS. DELLIGATTI: Yes, your Honor.

18 The government moves to dismiss Counts Three and Four  
19 of indictment three.

20 THE COURT: OK. Defense, I take it nothing to add to  
21 that.

22 MR. MATTINA: Correct, your Honor.

23 THE COURT: That motion is granted. I dismiss those  
24 two counts in light of *Taylor*.

25 With that, are counsel now prepared to proceed to

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1 sentencing?

2 MS. DELLIGATTI: Yes, your Honor.

3 MR. MATTINA: Yes, your Honor.

4 THE COURT: All right. So in anticipation that that  
5 would be the case, I have reviewed a number of things. I have  
6 reviewed the case background before Judge Batts, including the  
7 transcript of sentencing from 2012. I've also reviewed the  
8 original presentence report, I've reviewed the supplemental  
9 presentence report prepared by the probation department and  
10 filed on August 10 of this year. It is docketed at docket 32.

11 I have also received the following additional  
12 submissions: First, the defense's sentencing submission which  
13 is dated September 28, plus various attachments. Among other  
14 things, these include a letter from the defendant, other  
15 letters in support of the defendant, and extracts of the  
16 defendant's Bureau of Prisons sentencing records. I've  
17 reviewed the government's sentencing submission dated  
18 October 6. I have also recently received yesterday a letter  
19 from the defense which helpfully gives the court a roadmap on  
20 the premise that the court was inclined to reduce sentence and  
21 to do so in a manner requested by the defense of a manner in  
22 which the sentences might be imposed on the many surviving  
23 counts to achieve that.

24 I thank you for that. I hadn't expected that  
25 submission, but certainly understand why, were the court

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1 inclined to go in that direction, such a letter would have been  
2 of assistance or would be of assistance.

3 Have the parties received each of these submissions?

4 MS. DELLIGATTI: Yes, your Honor.

5 MR. MATTINA: Yes.

6 THE COURT: And has anything else been submitted in  
7 connection with this sentencing?

8 MS. DELLIGATTI: Not from the government, your Honor.

9 THE COURT: Same two answers?

10 MR. MATTINA: No, your Honor.

11 THE COURT: Very good.

12 Mr. Mattina, have you read the presentence report and  
13 the supplemental presentence report?

14 MR. MATTINA: I have, your Honor.

15 THE COURT: And have you discussed them with your  
16 client?

17 MR. MATTINA: I have, your Honor.

18 THE COURT: Mr. Nguyen, I know you had reviewed the  
19 original presentence report back in the day.

20 Have you reviewed the supplemental presentence report?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: OK. Have you discussed these with your  
23 lawyers?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Could you kindly move the microphone

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1 closer to you.

2 Thank you.

3 Have you had the opportunity to go over with your  
4 lawyers any errors in the supplemental report or anything else  
5 that should be taken up with the court?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Ms. Delligatti, have you reviewed the  
8 supplemental presentence report?

9 MS. DELLIGATTI: I have, your Honor.

10 THE COURT: All right. Putting aside the calculation  
11 of the sentencing guidelines, does anybody, beginning with the  
12 government, have any objections to the report regarding its  
13 factual accuracy?

14 MS. DELLIGATTI: No, your Honor.

15 MR. MATTINA: No, your Honor.

16 THE COURT: All right. Then hearing no objections, I  
17 will adopt the factual recitations set forth in the original  
18 presentence report and in the supplemental presentence report.  
19 The supplemental presentence report will be made a part of the  
20 record in this matter. It will be placed under seal. In the  
21 event an appeal is taken, counsel on appeal may have access to  
22 the sealed report without further application to this court.

23 Counsel, I assume the parties' sentencing submissions  
24 should be filed under seal given the references to the --

25 MR. MATTINA: Yes, your Honor.



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1 THE COURT: -- to Section 5K1 and the like.

2 MS. DELLIGATTI: Your Honor, the government redacted  
3 the portions of its letter that pertain to Mr. Nguyen's  
4 cooperation, so I think it would be perfectly appropriate to  
5 leave the redacted version --

6 THE COURT: That's fine.

7 MS. DELLIGATTI: -- on the docket as it is.

8 THE COURT: I'm happy for your submission as redacted  
9 then to be filed on the public docket.

10 Mr. Mattina, given the centrality of that topic to  
11 your letter. I authorize you to simply file your report under  
12 seal in its entirety.

13 MR. MATTINA: Your Honor, we have already filed  
14 redacted versions on ECF.

15 THE COURT: On the other hand, that's fine, too.

16 Very good. Thank you.

17 All right. Turning to the sentencing guidelines, the  
18 court is no longer required to follow the sentencing  
19 guidelines, but I am required to consider the applicable  
20 guidelines in imposing sentence. To do so, it's necessary that  
21 the court accurately calculate the guidelines sentencing range.

22 In this case, there being a cooperation agreement, the  
23 parties' plea agreement did not contain the stipulation as to  
24 how the sentencing guidelines apply. Nonetheless, it appears  
25 that the parties now agree with the probation department as to

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1 how the guidelines prior to a downward departure apply. The  
2 probation department calculates an offense level of 43, a  
3 criminal history category of IV, yielding a predeparture  
4 guideline range of life imprisonment.

5 Do the parties agree with that calculation?

6 MS. DELLIGATTI: Yes, your Honor.

7 MR. MATTINA: Yes, your Honor.

8 THE COURT: All right. Then based on the parties'  
9 present agreement and the absence of objection, my independent  
10 evaluation, I accept the guideline calculation in the  
11 presentence report.

12 The next subject I need to cover is departures, which  
13 is to say within the guidelines framework.

14 Ms. Delligatti, is the government, much as it did in  
15 2012, today moving for a downward departure under Section 5K1.1  
16 and relief for such mandatory minimum sentences as remain  
17 pursuant to Section 3553(E)?

18 MS. DELLIGATTI: It is, your Honor, on the same  
19 grounds on which it moved at Mr. Nguyen's original sentencing.

20 THE COURT: Very good. I grant that motion.

21 A downward departure and a substantial one remains  
22 very much warranted in this case as it was at the original  
23 sentencing, and for the same reasons, I intend to depart  
24 downward today.

25 All right. Having taken care of those necessary

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1 preliminaries, does the government wish to be heard with  
2 respect to sentencing?

3 MS. DELLIGATTI: Yes, your Honor.

4 Just briefly. I'll summarize what the government's  
5 position in its letter is. Of course, as your Honor is aware,  
6 what the government thinks is the appropriate sentence today is  
7 the same sentence that Judge Batts imposed many years ago, so  
8 that would be 300 months, I think technically to be imposed on  
9 the seven remaining counts for which Mr. Nguyen was sentenced  
10 to 240 months' imprisonment originally.

11 Your Honor --

12 THE COURT: You said seven.

13 MS. DELLIGATTI: I think there were seven of those  
14 counts, your Honor.

15 THE COURT: I don't think so. I thought my  
16 tabulation --

17 MS. DELLIGATTI: One, two, three, four, five, six,  
18 seven.

19 THE COURT: My calculation is that there were 11  
20 counts, including the ones in California.

21 MS. DELLIGATTI: I think it was Counts One through  
22 Four of indictment one, your Honor; Count Two of indictment  
23 two; Counts One and Two of indictment three.

24 THE COURT: Sorry. Take a look at the supplemental  
25 presentence report, and it picks up the presentence report, the

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1 original one. And on the second page of the original  
2 presentence report under penalties, it lists under offenses, it  
3 lists 13 counts of which two have now gone away.

4 I see defense counsel lightly nodding. Mr. Mattina,  
5 are you in agreement that there are 11 surviving counts?

6 MR. MATTINA: I am, your Honor.

7 THE COURT: Ms. Delligatti, I think this is really  
8 purely going to be a matter of counts and allegation. I think,  
9 as a formal matter, I do need to impose sentence on 11 counts.

10 MS. DELLIGATTI: That's right, your Honor. There are  
11 11 surviving counts.

12 I think a couple of those counts, Mr. Nguyen was  
13 originally sentenced to a lower term of imprisonment to 120  
14 months' imprisonment. But I think as a practical matter, your  
15 Honor, resentencing on all 11 of those counts -- or 13, your  
16 Honor, excuse me --

17 THE COURT: There were 13. Two are gone.

18 MS. DELLIGATTI: So 11.

19 THE COURT: Yes.

20 MS. DELLIGATTI: The government suggests would be  
21 appropriate.

22 THE COURT: And you would recommend that that be  
23 constructed in any particular way?

24 MS. DELLIGATTI: I think, your Honor, the government  
25 would recommend it to be constructed similarly to what defense

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counsel recommended, but without the downward departure today.

So Counts One through Four of indictment one, Count Two of indictment two; Counts One and Two of indictment three; so the government's proposal would be that the sentence imposed on those counts be 300 months.

THE COURT: Right, right.

In other words, to get there, as I understand it -- one moment. I'm just calling up the presentence report.

There appears to be only one count --

I see. In other words, the Counts One through Four of indictment one authorize a term of up to life imprisonment and, therefore, definitionally authorize a term of 25 years' imprisonment.

MS. DELLIGATTI: That's right, your Honor. Yes.

And so with respect --

THE COURT: And everything else would simply be the statutory maximum all to run concurrently.

MS. DELLIGATTI: Exactly, your Honor. Yes.

THE COURT: OK. Go ahead.

MS. DELLIGATTI: So, your Honor, the only other thing I would highlight for the court is that I think it's clear from our letter, the government does not dispute that the defendant has, of course, served a majority of his sentence. The government does not dispute that over the course of the time the defendant has been in custody, he has shown some

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1 rehabilitation.

2 But the principal question for these proceedings, your  
3 Honor, is whether the Section 3553(a) factors ought to be  
4 balanced differently and whether some sort of disruption of  
5 that balance now overriding the sentence that Judge Batts  
6 originally imposed.

7 That might be the case, your Honor, in resentencing  
8 proceedings where it's clear that the defendant was given more  
9 time because of the convictions that are now vacated or in  
10 resentencing proceedings where the guidelines are, in fact,  
11 different and lower now when the court is considering the  
12 defendant's convictions without the vacated convictions, your  
13 Honor.

14 But here, as your Honor noted, the guidelines remain  
15 unchanged. They remain life imprisonment, and as your Honor  
16 also noted, Mr. Nguyen received a huge break from the life  
17 sentence that the guidelines recommended in his original  
18 sentence in large part because of the same factors the defense  
19 or the court were to consider today.

20 So the fact of the matter, your Honor, is that this is  
21 not a case in which the circumstances have so changed, such  
22 that a reduction in sentence or a reassessment of the 3553(a)  
23 factors is warranted by the court. The government I think  
24 agrees, your Honor, that the most compelling reason for  
25 reducing a sentence here is a mere fact that the defendant has

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1 served the vast majority of his sentence. But all the  
2 government would submit on that point, your Honor, is that that  
3 is not a principled reason in and of itself to reduce a  
4 sentence when considering the 3553(a) factors in balance.

5 The original sentence was more than appropriate. It  
6 was incredibly lenient. The government agreed with probation's  
7 recommendation, of course, in its 5K submission that the court  
8 should downwardly depart in that sentence, but there is no  
9 reason to reduce it any further now, your Honor.

10 THE COURT: It's an oddity, isn't it, that Judge Batts  
11 made the firearms counts consecutive, right?

12 I mean, she would have had to do so had there not been  
13 cooperation and the 3553(e) motion. But with the benefit of  
14 that motion, there was no obligation to run those two counts  
15 consecutive. She could have easily achieved the 25-year  
16 sentence, among other things, on the first four counts of  
17 indictment one.

18 Granted she doesn't say anything suggesting that of  
19 all things the firearms counts made a difference to her insofar  
20 as there were five people murdered. It is an oddity that she  
21 chose to do that.

22 MS. DELLIGATTI: Your Honor, candidly, I apologize.

23 I don't know the answer to the question of whether she  
24 had some liberty not to run those counts consecutively. I  
25 certainly take your Honor's credit, your Honor.

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1 THE COURT: No. The reason why I say that is this is  
2 a familiar phenomenon before me --

3 MS. DELLIGATTI: Sure.

4 THE COURT: -- where the motion that's made under  
5 Section 5K1.1, that affords relief from the guideline range.

6 MS. DELLIGATTI: Also affords relief.

7 THE COURT: From either mandatory consecutive or  
8 mandatory sentences.

9 MS. DELLIGATTI: Correct.

10 THE COURT: So it seems to me that among many, many  
11 options, she had to get to 300 months or a number that wouldn't  
12 have assigned any unique value to the firearms offenses, which  
13 at least gives rise a little bit to the thought 2expoundment of  
14 is it possible that for some reason she attached some  
15 significance to them.

16 Countervailing that is common sense, which is that  
17 there were five people whom this man killed. The use of the  
18 firearm, as opposed to any other weapon in connection with  
19 that, is hard to see why that would add logical time to the  
20 balance. But it is an oddity.

21 MS. DELLIGATTI: I think that's right, your Honor. I  
22 think I would agree that I think, given the nature of the  
23 crime, it's not surprising that there was some separate  
24 sentence carved out for the use of firearms. I don't  
25 necessarily think that when you look at the sentencing



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1 transcript as a whole, it suggests that Judge Batts would have  
2 imposed a different sentence had there not been the two  
3 firearms counts, especially considering the difference between  
4 the sentence she did impose on the other counts which carried a  
5 much higher guideline sentence.

6 THE COURT: Right. I suppose the other --

7 Just a moment. I suppose the other relevant point is  
8 that even if there was a reason to think that she thought the  
9 firearms offense materially influenced the just overall  
10 sentence, the facts underlying the dismissed counts remain the  
11 same. It's purely the legal technicality of how the  
12 categorical rule applies to them.

13 So even if we indulge that Judge Batts found the  
14 presence of a firearm to be a big deal and amid all the other  
15 crimes here, the fact of the substance of those crimes having  
16 been committed remains the same. It's merely a technical  
17 change this law.

18 MS. DELLIGATTI: I think that's right, your Honor,  
19 which is, of course, why the Second Circuit and other circuits  
20 have found quite easily that a court is, of course, perfectly  
21 entitled to impose the same sentence when looking at the same  
22 underlying factual record, even considering the vacated counts.

23 THE COURT: OK. All right. Thank you.

24 Anything further from the government?

25 MS. DELLIGATTI: No, your Honor. Thank you.

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1 THE COURT: Mr. Mattina, I take it you'll be taking  
2 lead.

3 MR. MATTINA: Yes, your Honor.

4 THE COURT: Go ahead.

5 MR. MATTINA: Your Honor, we're here today to make  
6 what we believe to be a reasonable and modest request that  
7 Mr. Nguyen be sentenced to time served with five years of  
8 supervised release. Mr. Nguyen's projected to be released in  
9 July 2024, so essentially we're asking for a nine-month  
10 reduction in his original sentence.

11 What we want to focus on today is what's changed since  
12 2012, since Mr. Nguyen was originally sentenced. We want to  
13 focus on three changes. The first is Mr. Nguyen's health, the  
14 second is his rehabilitation, and the third is the time he  
15 spent in prison during the COVID-19 pandemic.

16 THE COURT: Sorry. On that one --

17 MR. MATTINA: Yes.

18 THE COURT: -- I would have been open to that  
19 argument, but not on your papers. I'm not going to consider it  
20 being raised now. It's simple too late.

21 MR. MATTINA: I believe we do make reference to it in  
22 our submission. If I could have a moment.

23 THE COURT: Tell me where it is.

24 MR. MINEAR: Your Honor, it's on page 11 at the very  
25 bottom.

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1 THE COURT: Yes.

2 MR. MATTINA: It carries on to page 12.

3 THE COURT: That literally doesn't cut it. This is  
4 the entire of it.

5 Mr. Nguyen was imprisoned for the determination of the  
6 COVID-19 pandemic, and then it quotes language that I cited in  
7 a different case involving the price exacted there. But there  
8 is not word one in the papers here about Mr. Nguyen's  
9 experience in COVID-19. I will tell you that as I have  
10 released many defendants based on representations of the asthma  
11 that they had or why the pandemic was affecting themselves  
12 medically or threatened to do so, I've released prisoners based  
13 on a factual showing that they were in crowded municipal  
14 facilities where there is a heightened risk of getting  
15 COVID-19, but there is literally not one word about  
16 Mr. Nguyen's experience with COVID-19. He didn't say anything  
17 about that in the compassionate release motion.

18 And the memo here doesn't say anything about what the  
19 conditions were like at Lompoc, whether he had some medical  
20 condition, whether he even got COVID-19. So with respect,  
21 COVID-19 is not an automatic get-out-of-jail-early card. It  
22 requires some degree of factual substantiation. It's way too  
23 late for that at the oral part of the sentencing hearing where  
24 all that is stated is that his time in Lompoc coincided with  
25 COVID-19. I have to take that off the table. Had you made

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1 that argument, I would have been interested, and the government  
2 would have had an opportunity to respond. There might have  
3 been some factual portrait of what the experience was like.

4 Sorry about that, but, I mean...

5 MR. MATTINA: That's fine, your Honor. If I can --

6 THE COURT: I'm sorry.

7 MR. MATTINA: We do say at the end of that sentence,  
8 that was obviously not contemplated at the time of Judge batts'  
9 original sentence.

10 THE COURT: And --

11 MR. MATTINA: I'm sorry, your Honor.

12 THE COURT: -- it is correct that it wasn't  
13 contemplated. The problem is that there is literally nothing  
14 that you've given me that tells me what it was like for him.  
15 In the MCC here, it was a horror show. In some of the FCIs,  
16 there were dreadful experiences. There were experiences for  
17 people who had underlying respiratory risks.

18 And then there were situations where the factual  
19 submissions that I was getting in, for example, the service of  
20 compassionate release motions simply did not make out prison  
21 conditions that were so far off the mark as to be that  
22 consequential. I just don't know what the facts are here.

23 MR. MATTINA: Understood, your Honor.

24 If I may. We were going to expound upon Mr. Nguyen's  
25 services, Mr. Nguyen's, during oral argument. I understand

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1 you're saying we missed the boat, so to speak.

2 THE COURT: As a matter of basic evidentiary fairness,  
3 you would be making a factual proffer to me about what his  
4 experience has been like under COVID. Under those  
5 circumstances, the government's really in no position to be  
6 able to respond. I mean, it was surprising to me, to be honest  
7 with you, that COVID was absent either from his application for  
8 compassionate release or having been alerted by the nature of  
9 my denial of that motion, not to say something about it with  
10 factual backup here.

11 But it was the dog that didn't bark in the defense  
12 submission here. It has worked for many but not all  
13 defendants. But I took the defense sentencing submission to be  
14 saying that there is nothing that distinguishes him from any  
15 prisoner in the United States who happened to be in prison, you  
16 know, beginning and going forward from March of 2020.

17 Sorry to say that, but...

18 MR. MATTINA: But that was not the intention. I  
19 understand your Honor's point.

20 THE COURT: Good.

21 MR. MATTINA: So I'll move on to -- I'll focus on the  
22 two points that I was originally going to speak about.

23 THE COURT: Yes.

24 MR. MATTINA: The first change is Mr. Nguyen's health.  
25 As the medical records reflect, over the past year or so he's

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1 been suffering from stomach issues, and the best way to  
2 describe it to the court is that these are flareups or  
3 episodes, so to speak. When they happen, he has quite severe  
4 abdominal pain. He can't hold food down. He can't sleep. He  
5 becomes weak and he vomits for days in a row.

6 Mr. Nguyen has not received a diagnosis, and we don't  
7 want to speculate as to what is causing his symptoms, but...

8 THE COURT: Tell me why he hasn't had a diagnosis.

9 MR. MATTINA: Your Honor, he has asked for treatment,  
10 from what we can tell from the record --

11 THE COURT: Has or has not?

12 MR. MATTINA: Has made requests for treatment.

13 From what we can tell from the records, the extent to  
14 which that request has been met is that he's been ordered, sent  
15 for an X-ray of his abdomen, and also given laxatives. That is  
16 what we can tell from the records.

17 We don't want to speculate as to what is causing these  
18 issues, but his family and friends have written to the court to  
19 express their concerns.

20 THE COURT: Let me ask you this question. He ought to  
21 get adequate treatment to get to the bottom of what's happening  
22 here, but that's a familiar situation that this court  
23 experiences with defendants who don't happen to be before me  
24 for a technical resentencing. And counsel will, for example,  
25 ask the court to issue an order that effectively directs the

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1 Bureau of Prisons to furnish medical care sometimes relating to  
2 eyesight, sometimes relating to diabetes, or other things.

3 I am happy to do that and stand ready to do that.

4 While there are some limits to what I can make the executive  
5 branch do, that is an order I feel completely comfortable  
6 issuing. And although I have no experience with Lompoc, I can  
7 tell you that the prisons that have tended to receive those  
8 orders have tended to respond to them with some dispatch.

9 Why isn't the more limited remedy for you to get me an  
10 order, which I'll be delighted to issue tomorrow, that directs  
11 the facility to step up its game in terms of his treatment?

12 MR. MATTINA: Because, your Honor, we are concerned  
13 that the Bureau of Prisons just isn't able to treat him  
14 properly. And I think the government admits in their letter to  
15 the court that, of course, Mr. Nguyen would receive more  
16 favorable care if he was a free man.

17 THE COURT: Look, the problem is we're at the stage we  
18 don't even have a diagnosis. So to talk about the treatment is  
19 putting the cart ahead of the horse. We don't know yet what  
20 the diagnosis is, and that would be in the spirit of what he  
21 needs. But to say he should get out of jail when we haven't  
22 even tried, for example, the lesser restrictive alternative of  
23 the court's directing the Bureau of Prisons to get its act  
24 together and get him a diagnosis, seems to me skipping a step.

25 MR. MATTINA: Your Honor, our view is that the failure

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1 to diagnose is the inadequate care and, you know, it's not our  
2 fault that we're putting the cart before the horse, so to  
3 speak. If they would adequately diagnose, we wouldn't have  
4 to --

5 THE COURT: I appreciate that.

6 Look, I appreciate from where the defense in this case  
7 stands, you have not been assigned to represent Mr. Nguyen for  
8 a long period of time. And from the moment you took on the  
9 representation, there was effectively a resentencing not long  
10 on the horizon.

11 The problem may simply be that Mr. Nguyen, until the  
12 accident of the combination of *Taylor* and then the opinion  
13 denying compassionate release identifying the *Taylor* problem  
14 with two of his convictions, he didn't have any lawyer to shake  
15 the trees for him and to get a judge to write Lompoc to say, by  
16 order, get this treatment, get this diagnosed. But where we  
17 are now is that that remains an available option.

18 And it seems to me -- tell me why it's unreasonable to  
19 proceed this way -- for you to get me an order that is tailored  
20 to the draft order that is tailored to his needs to get him a  
21 diagnosis and fast, and if it turns out that Lompoc is blowing  
22 that off, you then have, albeit in the form of a compassionate  
23 release motion, something to work with.

24 But without having explored that option, candidly, the  
25 fact that he is vomiting and his stomach hurts doesn't seem to



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me to be a basis to release, to shorten the sentence that Judge Batts imposed.

MR. MATTINA: Understood.

THE COURT: Look, if you are having some pushback on it, I'm happy to hear it. Better for me to tell you what I'm thinking about that and give you a chance.

MR. MATTINA: Absolutely, your Honor. Understood. And we want to focus today on what's changed since 2012, and that's one of the things that has changed since 2012. And I understand your Honor is not going to entertain my third thing that's changed since 2012, but I would like to move on to the second, if that's OK.

THE COURT: Yes.

MR. MATTINA: The second thing that's changed is Mr. Nguyen himself. Over the last 20 years, he has shown remorse and taken steps to become a better man. And actions speak louder than words, and I don't want to misquote the government. But from what I heard today, they are singing a different tune than they were in response to his motion for compassionate release.

In that motion, they say they certainly commend Mr. Nguyen for his clear efforts to make productive use of his time in prison. I don't think that was the tone and tenor of what you heard this afternoon about those rehabilitative steps. At the time of his original sentencing, it was unknown what

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1 Mr. Nguyen would do with his time in prison. We now know. We  
2 have an answer. This is a man whose taken steps to improve  
3 himself. I mean, he's gotten his GED. He has become English  
4 proficient. He's taken courses in computer education, culinary  
5 arts, nutrition. He's taken Spanish lessons and taken up  
6 welding. He's also taught fellow prisoners Chinese.

7 These are all voluntary steps that he's taken, not  
8 been ordered of him. Whether those steps are extraordinary, as  
9 the government says, they are not in their motion, that's not  
10 relevant for today's purposes whether it's extraordinary.

11 You know, the letters in support for Mr. Nguyen's  
12 family and friends add credibility to his actions. They have  
13 noticed the steps he's taken and extremely grateful for all of  
14 their support. But, your Honor, that didn't happen by  
15 accident. That's because of the steps he's taken. I would ask  
16 the court to please take that into consideration.

17 Skipping over my point on the pandemic conditions,  
18 that's what's changed since Mr. Nguyen was first sentenced, and  
19 we submit that when you look at those changes, when you look at  
20 his age, he's 57. When you look at the substantial assistance  
21 that he provided to the government to take down the Frank Ma  
22 organization, which was a violent mafia. That is what it was.

23 We struggle to see how it benefits anyone, either the  
24 public or Mr. Nguyen, to keep him in prison for nine more  
25 months, when this court has the ability to release a man who

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1 has taken steps to better himself, has shown remorse to the  
2 victims, and has health issues. We struggle to see why we have  
3 to go through all the steps your Honor went through earlier to  
4 make applications for him to get medical treatment.

5 Your Honor can do that right now. He can get the best  
6 care in the world if he's released today. And so, you know, we  
7 ask you to please take that into account.

8 And Mr. Nguyen would like to address the court if  
9 that's OK.

10 THE COURT: OK. What's the plan for him after he's  
11 released, whether it's now or nine and a half months from now?

12 MR. MATTINA: Your Honor, he has family and friends in  
13 California. He has a place to live with a relative of his. He  
14 has a job in California just outside of Oakland at a  
15 construction company. I was quite amazed. I have been dealing  
16 with a good friend of his for 30 years, and I told him the  
17 court is going to ask me this very question. I'm going to have  
18 to have an answer as to what you're going to do with your time.  
19 That's his plan, and we have a letter in support from the  
20 employer saying he is --

21 THE COURT: Which I read with interest.

22 MR. MATTINA: Yes.

23 And I have the address of where he would live in  
24 Oakland.

25 THE COURT: All right. Thank you.

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1           Thank you to you and for the rest of your team for  
2 taking on the representation at short notice and very  
3 effectively.

4           MR. DEVLIN-BROWN: Your Honor, would it be possible if  
5 I just add a thing or two, or no?

6           THE COURT: Of course.

7           Just speak into the microphone.

8           MR. DEVLIN-BROWN: Certainly, your Honor.

9           So, on the health order issue, I really do think  
10 that's two tracks, because for one thing under 3553(a), right,  
11 and we're sentencing him as he is today, a court can, of  
12 course, consider the person's health in deciding the length of  
13 their sentence.

14           So I think it's sort of relevant as the man he is  
15 today, not the man he was when he was sentenced before.

16           THE COURT: You're talking now about the stomach?

17           MR. DEVLIN-BROWN: The stomach, principally the  
18 stomach.

19           In terms of getting an order, I do think that is a  
20 separate track, and obviously if your Honor sentences him to  
21 the original sentence, that's something we would pursue. I  
22 think the complication there is we don't know if he's going to  
23 be at the MDC, how much longer he will be given the release  
24 date, or where he's going to be sent.

25           THE COURT: By the end of the proceeding you'll at

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1 least know what the remaining length of the sentence is, and  
2 I'm happy to issue an order and tailor it as more information  
3 comes in. The real issue is you're absolutely right that I can  
4 take into account, and should, his current medical condition as  
5 it relates to his stomach. The problem is that, as described  
6 to me, it may be a big deal and it may be not such a big deal  
7 at all. It may be a matter of changed diet or a laxative or a  
8 prescription or something. I just don't know. I'm not a  
9 medical doctor.

10 But in the absence of demonstrated proof that this is  
11 a big deal, to cite the stomach pain as he has as a reason to  
12 lop nine and a half months off the effective sentence that  
13 Judge Batts imposed, with a lot of information in her hand,  
14 does not seem to me to be right. Seems to me that I'm sorry  
15 he's having stomach pain. I'm sorry he's throwing up.

16 He killed five people and the judge sentenced, set a  
17 sentence factoring all that into account. Stomach pain without  
18 a diagnosis of it as being, you know, durable, grave, a very  
19 big deal seems to me unpersuasive.

20 MR. DEVLIN-BROWN: With respect to, your Honor, I  
21 don't think that is what the record, even the existing record,  
22 reflects as to his stomach pain. There it reports in there,  
23 which are not contradicted, that he cannot eat for days and  
24 days at a time because he throws everything up. I think a  
25 colonoscopy is probably what -- I'm not a doctor either --

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1 probably the logical next step. I don't know that that is  
2 possible in the Bureau of Prisons and, of course, your Honor --

3 THE COURT: I can assure you that whether it's within  
4 the Bureau of Prisons or through one of the providers with whom  
5 they have a medical contract, things much more esoteric than  
6 colonoscopies get ordered.

7 I've had difficult valve replacements. I've had stuff  
8 like that. So it's available. It's just a matter of getting  
9 him here, and he's very blessed to have a law firm that will  
10 now champion him as to that. To the extent it's not clear, I  
11 absolutely encourage your continued retention to follow up on  
12 that issue.

13 MR. DEVLIN-BROWN: Certainly, your Honor.

14 And then the other thing, I'll be brief, I just do  
15 think it's important that we make a record of what your Honor  
16 has ruled that you're not going to consider, because the  
17 government hasn't had a chance to respond, but just so that  
18 record is clear, our submission on COVID is not specific to  
19 him. It's not that he had any unusual trouble. It's simply  
20 that I don't know that there is any facility in this country --  
21 I don't know if the government would disagree -- where in those  
22 first months of COVID, Bureau of Prisons locked everyone down.  
23 They had limited ability to see or no ability to see anyone  
24 outside, and that is not the sort of thing that was  
25 contemplated at the time of the sentence.

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1 Does that mean someone should not have a very serious  
2 sentence still, given what the crimes are? Of course it  
3 doesn't. I think it is a factor, and with respect, that that  
4 at least should be considered.

5 THE COURT: Fair enough. The record is made. Thank  
6 you.

7 All right. One moment.

8 (Pause)

9 Mr. Nguyen, do you wish to make a statement?

10 THE DEFENDANT: Yes, your Honor.

11 First of all, I would like to say that --

12 THE COURT: Little closer to the microphone, sir.

13 THE DEFENDANT: I would like to thank God and I would  
14 like to thank the government for giving me a second chance in  
15 life. And I would like to take this time to say sorry to the  
16 victims' family. And I know -- sorry to the family of the  
17 victims for all the pain and grief that I've caused them, and I  
18 just want to say sorry to the government for all of my crime.  
19 And I do take full responsibility for my action.

20 And that's all, your Honor. Thank you.

21 THE COURT: All right. Thank you, Mr. Nguyen.

22 I'm going to take a moment just to collect my  
23 thoughts.

24 (Pause)

25 I should is ask you, Ms. Delligatti, the nature of the

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1 crimes here is such that, at the original sentencing anyway,  
2 victims would have had the opportunity to participate?

3 It's been decades. I don't know whether there are  
4 family members of any of the victims here who expressed an  
5 interest then or expressed an interest now in participating.  
6 I'm not sure how that works on a resentencing under these  
7 technical circumstances, but I ought to raise the question with  
8 you.

9 MS. DELLIGATTI: Your Honor, my understanding is that  
10 our office, in particular the victim witness coordinator, did  
11 make some effort to reach out to the victims and didn't receive  
12 a response from any of them.

13 THE COURT: All right. Thank you.

14 This will be several minutes.

15 (Pause)

16 Is there any reason why sentence should not now be  
17 imposed?

18 MS. DELLIGATTI: No, your Honor.

19 MR. MATTINA: No, your Honor.

20 THE COURT: All right. As I stated, the guideline  
21 range that applies to this case is life imprisonment. However,  
22 the government has moved for a downward departure and relief  
23 from the mandatory minimum sentences on certain counts of  
24 conviction. And for the reasons given by Judge Batts, such  
25 relief is clearly warranted.



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1 Under the Supreme Court's decision in *Booker* and the  
2 cases that have followed, the guideline range, even after  
3 taking into account a downward departure to reflect the  
4 defendant's substantial assistance, a court is still -- the  
5 guideline range is still only one factor that a court must  
6 consider in deciding the just and appropriate sentence.

7 The court must also consider the other factors set  
8 forth in the sentencing statute Title 18, United States Code,  
9 Section 3553(a). These include the nature and circumstances of  
10 the offense and the history and characteristics of the  
11 defendant, the need for the sentence imposed to reflect the  
12 seriousness of the offense, to promote respect for the law, and  
13 to provide just punishment, the need for the sentence imposed  
14 to afford adequate deterrence to criminal conduct, the need for  
15 the sentence imposed to protect the public from further crimes  
16 of the defendant, and the need for the sentence imposed to  
17 provide the defendant with needed educational or vocational  
18 training, medical care, or other correctional treatment in the  
19 most effective manner.

20 The court is also required to impose a sentence  
21 sufficient but no greater than necessary to comply, all in,  
22 with the purposes that I've just summarized. And here, I find  
23 that the sentence I'm about to pronounce is sufficient but not  
24 greater than necessary to satisfy the purposes of sentencing  
25 that I've just reviewed.

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1 Today's resentencing presents something of an unusual  
2 situation. I was not the original sentencing judge. A long  
3 time has passed since the offenses of conviction, which largely  
4 occurred in and around the early 1990s. A long time has passed  
5 since Mr. Nguyen's arrest, which I understand to have been in  
6 May of 2003. A long time has passed since the original  
7 sentencing. I'm now in my 13th year on the bench. Mr. Nguyen  
8 was arrested more than 20 years ago. At the time that Judge  
9 Batts sentenced Mr. Nguyen, I had been on the bench for four  
10 and a half months.

11 I've done my best to familiarize myself with the  
12 history and underlying factors of the case. I've read the  
13 original presentence report. I've read the transcript of the  
14 original sentencing proceeding. I've read the materials  
15 submitted in connection with Mr. Nguyen's compassionate release  
16 motion, and I've read counsel's thoughtful recent submissions  
17 plus attachments submitted in advance of today's sentencing.

18 I've given thought methodologically as to how to  
19 approach the sentencing question today. My judgment on how to  
20 proceed is as follows: I'm going to treat the sentence imposed  
21 by Judge Batts as reflecting as of the date of the original  
22 sentencing, the proper balance of the 3553(a) factors,  
23 including credit for Mr. Nguyen's cooperation.

24 Now, I appreciate that counsel's recent letters have  
25 revisited those questions. The defense's letter emphasizing

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1 the significant value of Mr. Nguyen's cooperation, the  
2 government's letter emphasizes the terrible gravity and number  
3 of his offenses, which include multiple murders, five to be  
4 precise, two of innocent bystanders and a sixth attempted  
5 murder, shootings, robberies, a great deal of violence, drug  
6 dealing, thefts of cars, and threats from computer chip  
7 manufacturers.

8 Judge Batts' sentencing remarks stated that she had  
9 assessed all of these factors. Although she did not explain in  
10 detail how she reached this result, she arrived at the  
11 conclusion that a 25-year overall sentence struck the right  
12 balance. She was known to me, and to the bar, as a thoughtful,  
13 deliberate jurist, who sweated the details and was  
14 characteristically always solicitous of the defense.

15 My judgment is to accept Judge Batts' thoughtful  
16 assessment as correct based on the information known as of  
17 February 21, 2012, the date of the original sentencing. I  
18 will then examine what to me is the critical question today on  
19 resentencing, which is what has happened since then, how if at  
20 all do those post-sentencing developments bear on the 3553(a)  
21 factors, and do any of those developments support modifying  
22 that sentence.

23 Before turning to that question, I will also say this  
24 for the benefit of the defense. Had I chosen a different  
25 methodology today in which I reassessed for myself how the

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1 3553(a) factors and Mr. Nguyen's cooperation balanced out as of  
2 February 21, 2012, that would not have been to Mr. Nguyen's  
3 benefit. I'm absolutely certain that I would not have imposed  
4 an overall sentence below 25 years based on the information  
5 known at the time. I say that with the benefit of having, by  
6 now, presided over many cases alas involving murders and  
7 violence and having sentenced many cooperators in those cases.

8 From that experience, I have a pretty good sense how I  
9 would have viewed the just sentence, were I sitting where Judge  
10 Batts sat in February 2012. The gravity and scale and  
11 viciousness of the violence and murders here, in particular,  
12 would have weighed heavily with me. I would have viewed the  
13 need for just punishment in particular as immense. It is  
14 possible that I would have come up with the exact same sentence  
15 as Judge Batts did. It's also possible that I would not have  
16 rewarded Mr. Nguyen for his cooperation quite as generously as  
17 did Judge Batts.

18 As best that I can put myself in her shoes, I might  
19 well have imposed a higher sentence potentially one as high as  
20 five years higher, which is to say a sentence of 30 years'  
21 imprisonment. So in deciding to accept the balance struck by  
22 the always thoughtful Judge Batts, I am making a methodological  
23 call that, to the extent it benefits either party, it benefits  
24 the defense.

25 Again, it may be that, would I have imposed the same

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1 sentence, all I know, I wouldn't have imposed a lower one.

2 So what subsequent developments might occasion a  
3 reassessment?

4 One possibility might have been hardship in prison due  
5 to the unexpected development that was COVID-19. That has been  
6 the basis for many reductions of sentence. During the peak of  
7 the pandemic, I ordered the early release of at least a couple  
8 of dozen prisoners, and I've imposed lower sentences in scores  
9 of cases based on unexpectedly arduous conditions of  
10 presentence custody, whether due to the pandemic or the  
11 horrific conditions of local prisons.

12 Mr. Nguyen has not meaningfully made that argument,  
13 although alone substantiated it. It was not made at all in  
14 pro se compassionate release motion, and it was only lightly  
15 touched upon in his counsel's advocacy on resentencing.  
16 Specifically the only reference to COVID-19 was a generic  
17 single-sentence reference to the fact that Mr. Nguyen's prison  
18 term overlapped with the pandemic. But the defense submission  
19 is devoid of any factual detail on that point whether about  
20 Mr. Nguyen's medical or physical conditions or experience or  
21 journey or concretely how COVID-19 affected his experience at  
22 Lompoc. It may or may not be that a factually distinct  
23 narrative could have been developed specific to Mr. Nguyen and  
24 his journey during COVID-19, but I am unprepared to reduce the  
25 sentence of a defendant, let alone the considered sentence of a

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1 serial murderer based on the bear incantation of the two words  
2 COVID and 19. COVID-19, or harsh prison conditions, are not  
3 factually available as a basis to deviating from Judge Batts'  
4 sentence.

5 Next, Mr. Nguyen describes himself as suffering or  
6 apparently suffering from a stomach condition. I say  
7 "apparently" because I don't know what the actual underlying  
8 condition is. I credit that he is having the symptoms that he  
9 describes. It has caused, he reports, significant weight loss  
10 and vomiting. I'm quite sympathetic to that situation.

11 But on the present record, it falls short of  
12 justifying a reduction of sentence. The course of the stomach  
13 condition is, as yet, undiagnosed. It may or may not prove to  
14 be a big deal. The Bureau of Prisons in my experience is  
15 capable of securing medical diagnoses and care sufficient to  
16 diagnose and likely treat Mr. Nguyen's condition. On the  
17 present record, there is no reason to believe that the BOP will  
18 be unable to diagnosis and treat that condition, particularly  
19 if ordered to do so, as this court stands ready to do.

20 The decisions of mine that the defense cites that have  
21 reduced sentences on account of a medical condition have  
22 involved much more dire situations. Those decisions, like  
23 *United States v. Simon*, typically were issued during the peak  
24 of the pandemic, before vaccinations were available, while  
25 people across the country, including in this city, were dying

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1 of COVID-19 in droves. And they involved defendants with  
2 demonstrated medical conditions, such as obstructive pulmonary  
3 disorder or asthma, for which COVID-19 could easily cause  
4 death.

5 Mr. Nguyen is, as yet, not in any such demonstrable  
6 situation. He does have in common with many of the defendants  
7 whom I released during that period that he had served a  
8 significant majority of that sentence, but he has not  
9 established the companion factor in those cases, which is that  
10 he has a medical condition, in those cases one contraindication  
11 vis-a-vis COVID-19 warranting early release.

12 The defense next cites ways in which Mr. Nguyen has  
13 attempted, while in prison, to rehabilitate. He obtained a  
14 GED, became proficient in English, and has taken courses in  
15 Spanish, computer education, culinary arts, and welding. Those  
16 actions are, of course, all to the good. Mr. Nguyen has  
17 amassed very few disciplinary infractions, just one since July  
18 2019, none sounding in violence since November 2008, which  
19 given his violent past, has to be viewed as progress.

20 Nonetheless, I cannot say that these facts are  
21 meaningfully out of the ordinary. I considered these facts at  
22 the time of Mr. Nguyen's application for compassionate release.  
23 I found that they did not rise to the level of extraordinary so  
24 as to qualify him for such relief.

25 Now, the standard is different at a resentencing

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1 proceeding. The issue is not whether these actions are  
2 extraordinary and compelling, but whether they caused the court  
3 to weight 3553(a) factors or factor meaningfully differently  
4 than at the time of the original sentencing. My assessment is  
5 no. The court expects defendants to take advantage of basic  
6 resources offered at the BOP, and Mr. Nguyen as a cooperating  
7 witness presented himself at sentencing as having mended his  
8 ways and his intent on reflection and reform.

9 I cannot in good conscience say that the courses  
10 Mr. Nguyen has taken and his relatively good disciplinary  
11 report would have materially changed the sentencing calculus.  
12 For what it is worth, I doubt that Judge Batts, had she known  
13 in February 2012 that Mr. Nguyen was destined to take the  
14 courses he had and amassed the disciplinary record that he has,  
15 would have regarded those factors, though commendable, as  
16 terribly consequential in the context of the very grand  
17 considerations that dominated in either direction her  
18 sentencing assessment.

19 In the same vain, I have read the letters from  
20 Mr. Nguyen and from his family and friends.

21 These include his friend, Joanna Lam, who describes  
22 his stomach pains.

23 His son Justin, who has not seen him in 27 years, but  
24 spoken to him. He writes a few times over the phone and  
25 reports that Mr. Nguyen is "nothing but remorseful."



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1           His lifelong friend, Lloyd Tran, who describes  
2           Mr. Nguyen as kind and gentle.

3           His friend, Muoi Liu, who values Mr. Nguyen's  
4           friendship, honesty, and generosity.

5           His friend, Terri Cao, who says that Mr. Nguyen has  
6           "changed his ways," and says that he and Mr. Nguyen will always  
7           be there for each other.

8           His friend, Khanh Trinh, who says that Mr. Nguyen has  
9           shown remorse and has a loving and supportive family.

10          His longtime family friend, Thuy Walburg Dizon, who  
11          says that Mr. Nguyen "deeply, deeply regrets his unfortunate  
12          incident," and that his family loves and needs him.

13          And JC Tran, a manager of a building company, who says  
14          he wants to give Mr. Nguyen a construction job upon his  
15          release.

16          It is, indeed, encouraging to read these letters.  
17          These letters, they tell me that Mr. Nguyen will have a real  
18          support network upon his release from custody. Candidly,  
19          though, these letters are a piece or of a piece are the  
20          positive character letters that the court is familiar with and  
21          receives at sentencing. I do not dispute the sincerity of any  
22          of them. None of them say anything concrete about Mr. Nguyen's  
23          rehabilitation, about the past 20 plus years in prison, let  
24          alone anything that stamps it as out of the ordinary.

25          The defense's final point is that Mr. Nguyen's release

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1 date is close. His release date is, continuing good behavior,  
2 is under a year away. I understand it presently to be  
3 tabulated at July 26, 2024, which is some nine and a half  
4 months away. I appreciate the temptation to say, what's nine  
5 and a half more months measured against 20-plus years already  
6 served? What's the big deal?

7 But at the end of the day, an application for a change  
8 of a considered sentence has to be based on a change in law or  
9 a change in fact. Rigorous analysis, not sympathy, has to  
10 govern the court's decision.

11 Close enough is good enough is not a persuasive  
12 argument at resentencing. The change in law here that has  
13 occasioned the resentencing has zero bearing on the just and  
14 reasonable sentence. It involves the entirely technical  
15 application of the categorical rule governing Section 924(c) as  
16 applied to the offense of attempt to commit Hobbs Act robbery.  
17 It doesn't change any facts of Mr. Nguyen's offense conduct.  
18 And for the reasons I've stated, the material facts haven't, in  
19 my assessment, changed either.

20 If Judge Batts were presiding here today, I venture  
21 that she would have said there is nothing I'm hearing about  
22 today that is materially different from what, at the time of  
23 the sentencing, I would have expected to have heard about  
24 Mr. Nguyen some 20 years into the service of his sentence.

25 The bottom line is this: With regret, but with

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1 firmness, I am simply unpersuaded there is a basis to alter the  
2 sentence imposed by Judge Batts. This will, therefore be, one  
3 of the those many sentencings, resentencings brought about by  
4 developments in Section 924(c) case law that results in the  
5 same aggregate sentence being imposed as before, with the terms  
6 of imprisonment allocated to different offenses of conviction  
7 rearranged, to yield the same aggregate sentence as before.

8 I commend defense counsel for the energy and vigor of  
9 your arguments on Mr. Nguyen's behalf and for jumping in with  
10 both feet to this representation. The facts, it appears, just  
11 weren't there. But I find overall the sentence as originally  
12 imposed, in its aggregate anyway, the lowest that can satisfy  
13 the 3553(a) factors considered as a whole.

14 I'm now going to state the sentence I intend to  
15 impose. The attorneys will have a final opportunity to make  
16 legal objections before the sentence is finally imposed.

17 Mr. Nguyen, would you please rise. And, counsel,  
18 because part of what I'm about to do is reallocate, I'm going  
19 to go slowly, I'm going to ask everyone to check my math and to  
20 check to make sure that what I'm saying with respect to the  
21 many counts that are out there is faithful to the statutory  
22 maximums that exists for each count.

23 Mr. Nguyen, after assessing the particular facts of  
24 this case and the factors under Section 3553(a), including the  
25 sentencing guidelines and including Section 5K1.1, it's the

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1 judgment of the court that you are to serve an aggregate  
2 sentence of 300 months' imprisonment in the custody of the  
3 Bureau of Prisons, to be followed by a period of five years'  
4 supervised release.

5 As to particular counts, I impose a term of  
6 300 months' imprisonment on Counts One through Four of  
7 indictment one. I impose a term of 240 months' imprisonment  
8 on Count Two of indictment two and Counts One and Two of  
9 indictment three. I impose a 60-month sentence on Count One of  
10 indictment four and Count One of indictment five. I impose a  
11 120-month sentence on Counts Two and 33 of indictment five.  
12 All of these sentences are to run concurrently with one  
13 another.

14 As to supervised release, I impose a five-year term of  
15 supervised release on Counts One through Four of indictment  
16 one, and a three-year term of supervised release on all the  
17 other counts. These terms are to run concurrently with one  
18 another.

19 Before I turn to the terms of supervised release, let  
20 me just pause for a moment and make sure that what I have just  
21 proposed to impose as the sentence is faithful to the statutory  
22 maximums for each count.

23 MS. DELLIGATTI: That's correct, your Honor, given the  
24 20-year statutory maximum for indictments two and three.

25 THE COURT: OK. Defense?

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1 MR. MATTINA: Yes, your Honor.

2 THE COURT: All right. As to supervised release, it  
3 is my intention to impose the identical terms of supervised  
4 release as imposed by Judge Batts.

5 Just one moment.

6 The one term that was imposed by Judge Batts that she  
7 singled out at the sentencing, I'll read what she wrote is:  
8 The defendant shall be tested periodically at the direction of  
9 the Department of Probation for substance abuse, and should he  
10 test positive, he shall participate in a substance abuse  
11 prevention program, to be residential or nonresidential, as  
12 directed by the Department of Probation.

13 But it is my intention to impose all the mandatory  
14 conditions of supervised release and standard conditions of  
15 supervised release that are set out in the presentence report.

16 Let me ask you, Mr. Mattina, insofar as your client  
17 was present for the original sentencing and has read the  
18 judgment, is there any need for me to recite those out loud, or  
19 may I incorporate those by reference?

20 MR. MATTINA: That's unnecessary, your Honor.

21 THE COURT: All right. I'm not going to impose a  
22 fine. I am persuaded Mr. Nguyen does not have the ability to  
23 pay one.

24 Government counsel, was there either a forfeiture or  
25 restitution order the first time around?

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1 MS. DELLIGATTI: Your Honor, I don't believe there  
2 was. I checked before the proceeding, and I couldn't find any  
3 record of it.

4 THE COURT: I did not either.

5 MS. DELLIGATTI: Yes.

6 THE COURT: Defense counsel, do you have anything  
7 different to share?

8 MR. MATTINA: No.

9 THE COURT: Then I will not impose forfeiture or  
10 restitution.

11 Now, there is the matter of the special assessment,  
12 and I could use your help here. Judge Batts, on the 13 counts,  
13 imposed an aggregate special assessment of \$950. Were I  
14 imposing sentence today, I would have fewer counts, 11 counts,  
15 but I think all 11 of them would require a \$100 special  
16 assessment, which would actually increase the special  
17 assessment. That has the field of substantial ex post facto,  
18 and I do not intend to do there.

19 Government counsel, understanding that the court is  
20 not going to raise the special assessment from before, and I  
21 do need to do this on a count-by-count basis, do you have an  
22 understanding of what the special assessment was that ran with  
23 the two firearms counts the first time around?

24 MS. DELLIGATTI: Your Honor, I'm sorry. Candidly, I  
25 don't.

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1 THE COURT: Counsel, here is what I would like to do.  
2 Under no circumstances am I going to impose a special  
3 assessment that exceeds \$950. I am prepared to reduce the  
4 special assessment by the amount that would have been in place  
5 in February 2012 for the two firearms counts. I just don't  
6 know what that math is. It is likely that each of those counts  
7 either occasioned a 50 or \$100 special assessment. But without  
8 knowing the answer, I don't want to guess at it, and I don't  
9 want to get that wrong.

10 What I would propose to do is give counsel until  
11 Monday to confer with each other. This is going to take a  
12 little bit of archeology and figuring out what the special  
13 assessments were for those counts, and get me a proposed letter  
14 that guides me as to the relevant special assessment.

15 My intention is to deduct from \$950 the amount of the  
16 authorized special assessment for the two 924(c) violations as  
17 of February 2012.

18 Defense, do you have any objection to my proceeding on  
19 that point in that manner?

20 MR. MATTINA: No, your Honor.

21 THE COURT: Government?

22 MS. DELLIGATTI: No, your Honor.

23 And I apologize for not knowing the answer today, but  
24 someone from our office who was here in 2012 will know.

25 THE COURT: Yes. No apology necessary. I should have

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1 caught it as well. I came in here, frankly, having not focused  
2 on that nuance, and now that I am, I have to get it right.

3 All right. In any event, subject to that one detail  
4 that remains to be supplied, but where I've given you the  
5 formula that I will use to supply the detail, does either  
6 counsel know of any legal reason why this sentence shall not be  
7 imposed as stated, government?

8 MS. DELLIGATTI: No, your Honor.

9 THE COURT: Defense?

10 MR. MATTINA: No your Honor.

11 THE COURT: The sentence, as stated, is imposed.

12 Ms. Delligatti, I take it while I usually ask if there  
13 are any open counts, if there had been any, they would have  
14 been disposed of by Judge Batts, correct?

15 MS. DELLIGATTI: That's right, your Honor.

16 THE COURT: All right. Mr. Nguyen, I need to advise  
17 you, again, of your appellate rights.

18 To the extent you haven't given up your right to  
19 appeal your conviction and your sentence through your plea of  
20 guilty, your plea of guilty of long ago and the plea agreement  
21 or agreements you entered into with the government long ago,  
22 you have the right to appeal the actions taken today,  
23 specifically the denial of the application for reduced  
24 sentence.

25 If you're unable to pay for the cost of an appeal, you



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1 may apply for leave to appeal *in forma pauperis*. The notice of  
2 appeal must be filed within 14 days of the judgment of  
3 conviction, meaning the judgment that I will issue, and I  
4 expect that that judgment will issue early next week after I  
5 get guidance from counsel about the special assessment.

6 Do you understand that?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: All right. Let me ask defense counsel,  
9 insofar as I am generating a new judgment, that is a forum in  
10 which I can put in requests to the Bureau of Prisons. There is  
11 one obvious one that is staring all of us in the face which  
12 involves the stomach condition, but there may be others based  
13 on Mr. Nguyen's experience. I'm delighted to include in the  
14 judgment such guidance as you would want me to give the Bureau  
15 of Prisons.

16 Do you want to take a moment and confer with each  
17 other and with Mr. Nguyen as to recommendations you would like  
18 me to make to the Bureau of Prisons contained in the judgment?

19 That may also have the value of expediting, perhaps,  
20 any request, any court order, the effect of any court order  
21 relating to the stomach issue.

22 MR. DEVLIN-BROWN: Yes, your Honor.

23 If it's OK with the court, given that the judgment is  
24 probably not going to issue until at least Monday, if we could  
25 have until Monday, perhaps, to put in a letter, because I think

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1 we're thinking both of the stomach issue as well as any  
2 requests for where he serves the sentence.

3 THE COURT: Good thinking.

4 MR. DEVLIN-BROWN: That might be.

5 THE COURT: Good thinking.

6 Ms. Delligatti, under the circumstances the government  
7 has no dog in this hunt and that to the extent that the defense  
8 may request a different facility, I expect the defense will  
9 give me some form of words to use with respect the medical  
10 condition. Realistically, you're not going to have an  
11 objection, I take it, to my incorporating to the defense's  
12 recommendation.

13 If there is something that I find objectionable, I  
14 know what to do with it. I don't expect there to be. I take  
15 it I can proceed without seeking your feedback on this.

16 MS. DELLIGATTI: That's right, your Honor. Yes.

17 THE COURT: Very good.

18 Why don't we say by the end of Monday, get me any  
19 proposed language. If there is anything that requires any  
20 explanation, just put it in the letter. I would be happy to  
21 make that recommendation. Look, particularly with respect to  
22 the stomach ailment, I'm delighted to editorialize a little bit  
23 to get their attention.

24 Lately, I've been doing that by putting in bold face,  
25 not MDC, for example, in judgments that I'm happy to find a way

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1 to drive the point home with respect to the stomach ailment.

2 Because, Mr. Nguyen, you deserve better than a prison  
3 system that doesn't diagnose --

4 THE DEFENDANT: Thank you, your Honor.

5 THE COURT: -- a repeated condition. And while  
6 resentencing to my mind isn't the right response to that, there  
7 is a right response, and it's getting the Bureau of Prisons'  
8 act together. So I welcome counsel to come up with something  
9 muscular that I can say.

10 Beyond that, defense counsel, although your  
11 appointment was for the limited purpose of the resentencing  
12 proceeding, I will treat the care of Mr. Nguyen's stomach  
13 condition as subsumed in that assignment, and I will hope that  
14 you'll stay on in representing him for the purpose of lighting  
15 a fire under the behinds of the Bureau of Prisons to attend to  
16 his medical needs.

17 Can I have your assurance you'll do that?

18 MR. DEVLIN-BROWN: We will, your Honor.

19 THE COURT: Anything else from the government?

20 MS. DELLIGATTI: No, your Honor. Thank you.

21 THE COURT: Anything else from the defense?

22 MR. MATTINA: No, your Honor.

23 THE COURT: Mr. Nguyen, I'm almost certain I will  
24 never see you again. I'm also certain you'll never see me  
25 again. I want to wish you the very best. You have had --

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THE DEFENDANT: Thank you, your Honor.

THE COURT: -- an unusual journey, to say the least.

But I must say this. The letters I received about you from your friends and family, including people who haven't seen you in more than two decades, show that you left those people with a deep reservoir of affection. That says something very positive about you.

You're in your late 50s.

THE DEFENDANT: Yes, sir.

THE COURT: 50 how old?

THE DEFENDANT: 57 now, your Honor.

THE COURT: Trust me. You're still young. And even by the calculations I've been given, you'll be out in under a year. You've got a long way to go on this journey. And I hope that you will be guided by the very positive views that your friends and family have of you and use the rest of your time on this earth to live up to their view of you. It's obvious you've got something to offer, and I challenge you to do that.

I wish you the very, very best.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Thank you.

We stand adjourned.

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